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OFFICE OF PETITIONS

In re Application of
Horvath
Application No. 09/531,088
Filed: March 18, 2000
Attorney Docket Number 10147-22

**DECISION DISMISSING
PETITION**

This is a decision on the petition filed March 31, 2000 requesting that the above-identified application be accorded a filing date of March 17, 2000, rather than the presently accorded filing date of March 18, 2000. The petition is under 37 CFR 1.10(d).

Petitioner requests the earlier filing date on the basis that the application was purportedly deposited in Express Mail Service on March 17, 2000 by hand-carry to the United States Post Office at 30th and Market Streets, Philadelphia Pa 19104 and was deposited with a postal clerk prior to midnight on March 17, 2000.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See 37 CFR 1.6(a). (Emphasis supplied)

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the Express Mail mailing label or other official notation entered

by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date of the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

A grantable petition under 37 CFR 1.10 (d) must include a "showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day." Furthermore, the showing must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Evidence from the USPS may be the Express Mail Corporate Account Mailing Statement. Evidence that came into being within one business day after the deposit of correspondence as Express Mail may be in the form of a log book which contains information such as the Express Mail number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date of entry into the log.

The evidence presented has been considered but is not persuasive that the correspondence was deposited in Express Mail service on March 17, 2000, prior to the last scheduled pickup for that day. The evidence is insufficient to show that the "date-in" was incorrectly entered by the USPS.

The petition was accompanied by a copy of Express Mail mailing label No. EL399098346US showing a date of deposit in Express Mail of March 18, 2000, and a copy of an "Express Mail Tracking and Delivery Confirmation" report from the USPS which indicates that the Express Mail package was accepted on March 18 at 12:01 am.

Petitioner alleges that the Express Mail package in question was deposited with the USPS on March 17, 2000. In support, the petition is accompanied by a declaration by Gary D. Colby, an attorney with the law firm of Akin, Gump, Strauss, Hauer & Feld, LLP, stating that he presented the package to a postal clerk at 11:58 PM on March 17, 2000. The declaration was written and signed on Monday, March 20, 2000, which was after deposit and within one business day of the date of deposit.

The declaration of Mr. Colby indicates that, after the postal clerk indicated that the package would be postmarked on March 18, 2000, he attempted to have the postal clerk indicate that the package had been deposited on March 17, 2000, but the postal clerk refused. The petition indicates that applicant's representative thereafter contacted the Postmaster of the 30th Street Post Office and explained the circumstances surrounding the mailing of the package but the Postmaster has refused to change the postmarked date. No reasons for the Postmaster's refusal have been provided nor has a written statement from the Postmaster been submitted.

Placing the "date-in" on the Express Mail label by the postal clerk established that the package was actually received by the U.S. Postal Service. The evidence presented, including the refusal of both the postal clerk and the Postmaster to change the date, indicates that the Post Office did not receive or take custody of the package until March 18, 2000, and that the "date-in" was correctly entered by the USPS.

In addition, there is no indication in the petition as to what the "last scheduled pickup" for March 17, 2000, was for 30th Street Post Office. Was the Post Office open for receiving Express Mail packages 24 hours a day? What were the normal business hours for the Post Office? Were Express Mail packages normally accepted up until midnight on that day?

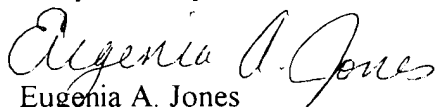
Based on the evidence presented, it is concluded that the application was properly accorded a filing date of March 18, 2000, the date of deposit in Express Mail as shown by the date on the Express Mail mailing label.

The petition is dismissed.

Any request for reconsideration should be filed within TWO MONTHS of the date of this decision in order to be considered timely filed. See 37 CFR 1.181(f).

The application is being returned to Art Unit 1644 for examination in due course with the presently accorded filing date of March 18, 2000.

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